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IN THE

Supreme Court of the United States

JOSEPH J. FILEBARK, *et al.*,
Petitioners,

v.

U.S. DEPARTMENT OF TRANSPORTATION and FEDERAL AVIATION ADMINISTRATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE UNIONS FOR LEAVE TO FILE, OUT OF TIME, A BRIEF *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY AND BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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MOTION OF THE UNIONS FOR LEAVE TO FILE, OUT OF TIME, A BRIEF *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

The National Treasury Employees Union (NTEU) and the American Federation of Government Employees, AFL-CIO (AFGE), (collectively, the Unions) hereby move this Court for leave to file, out of time, a brief *amici curiae* on behalf of neither party. Both parties have consented to the filing of an *amicus* brief, and counsel for petitioners has authorized us to represent that he does not oppose the filing out of time, without the required 10-day advance notification. The Solicitor General has not taken a position on this motion.

In support of this motion, the Unions show as follows:

1. The Rules of this Court do not specify a time for the filing of an *amicus* brief submitted before the Court's consideration of a petition for a writ of certiorari when that brief is in support of neither party. A brief *amicus curiae* in support of a respondent must be submitted within the time allowed for filing a brief in opposition. Rule 37.2(a). In the context of an *amicus curiae* brief in a case before the Court for oral argument, a brief in support of neither party must be submitted within 7 days after the time allowed for filing the petitioner's brief. Rule 37.3(a). In any event, the Rules specify that an *amicus curiae* must ensure that counsel for all parties receive notice of its intention to file an *amicus* brief at least 10 days prior to the due date. *Id.*

2. The Unions were not aware until shortly before respondents filed their brief that there was a possibility that the Solicitor General would not oppose the grant of the petition for certiorari. They were not certain of her position, and did not know the respondents' reasons for believing that this case presented an appropriate vehicle for Supreme Court review, until the response was filed on September 23, 2009. Counsel for NTEU formally notified each party on September 17, six days before the September 23 due date, that it intended to file an *amicus* brief if respondents acquiesced in the granting of certiorari. It was, however, not until September 23 that the Unions could reach a definitive conclusion regarding the need for an *amicus* brief urging the Court to deny the writ of certiorari. For this reason, the Unions were not able to give notice of their intention to file

an *amici curiae* brief at least 10 days prior to what we believe to be the filing date.

3. The Unions are filing this brief as speedily as possible. In addition, counsel for NTEU consulted with counsel for petitioners and made arrangements to provide him with a typed version of the brief by the evening of September 28, in sufficient time for him to file a reply if petitioners so choose. For that reason, counsel for petitioners has stated that he does not oppose the granting of this motion.

4. The Unions respectfully submit that their participation as *amici* on behalf of neither party would bring important information to the attention of the Court. The Unions' perspective is shared by neither party, and they make arguments not raised in either the petition or the response.

Accordingly, for these reasons, the Unions respectfully request that the Court grant them leave to file the accompanying brief *amici curiae* in support of neither party.

Respectfully submitted,

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BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICI* [1]

1. The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents the interests of approximately 150,000 employees of the federal government. It has a long history of representing its members' interests in federal court in, for example, 1) suits in the United States Court of Federal Claims or the federal district courts based on violations of money-mandating statutes and brought under the Tucker Act, 28 U.S.C. § 1491, and the Back Pay Act, 5 U.S.C. § 5596; 2) pre-enforcement challenges to illegal agency regulations or policies under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*; 3) actions for declaratory and injunctive relief involving statutes, regulations, or agency policies that violate the Constitution, brought under 28 U.S.C. § 1331; and 4) actions in district court where employees allege other statutory violations.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk. As explained in the accompanying motion, counsel received notice more than 10 days prior to the filing of this brief of the *amici*'s intent to file a brief, but they did not receive notice 10 days prior to what we believe to be the due date. No attorney for either party has authored this brief in whole or in part, and no person or other entity, other than the *amici*, made any monetary contribution to the preparation or submission of this brief.

NTEU has frequently confronted arguments that the CSRA precludes the exercise of federal court jurisdiction.[2] Indeed, NTEU was a party, or its lawyers were counsel, in many of the cases cited in the petition and response. For example, NTEU counsel litigated *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990), the case interpreting 5 U.S.C. § 7121(a)(1) to bar employees covered by a negotiated grievance process from bringing an action in district court under a money-mandating statute—there, the Fair Labor Standards Act, 29 U.S.C. § 216(b). In the wake of that decision, NTEU sought congressional action to clarify the law. In 1994, Congress responded favorably by amending 5 U.S.C. § 7121(a)(1) to overturn *Carter* and to clarify that the negotiated grievance procedure is only exclusive as to other administrative remedies, not as to judicial causes of action. Thereafter, NTEU provided legal representation to a federal employee in *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002), which

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[2] *See NTEU v. Von Raab*, 649 F. Supp. 380, 384-385 (E.D. La. 1986) (rejecting claim that CSRA precludes judicial review of challenge to constitutionality of drug-testing program), *rev'd on other grounds*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part and remanded*, 489 U.S. 656 (1989); *Bosco v. United States*, 931 F.2d 879, 882-83 (Fed. Cir. 1991), *aff'd on reh'g*, 976 F.2d 710 (Fed. Cir. 1992) (rejecting preclusion argument in suit for back pay under Prevailing Rate Act); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (affirming denial of motion to dismiss NTEU's pre-enforcement challenge to Office of Personnel Management regulations on grounds of CSRA preclusion); *NTEU v. Chertoff*, 385 F. Supp. 2d 1, 22-23 (D.D.C. 2005) (denying government's motion to dismiss NTEU challenge to lawfulness of regulations implementing new personnel system at the Department of Homeland Security), *aff'd in part, rev'd in part on other grounds*, 452 F.3d 839 (D.C. Cir. 2006).

held that the 1994 amendment reversed the *Carter* ruling. *Carter*, the subsequent legislative action, and the holding in *Mudge* are discussed extensively in respondents' brief at 6-7, 18-20. Most recently, NTEU participated as *amicus* in *Whitman v. Department of Transportation*, 547 U.S. 512 (2006), filing a brief addressing the breadth of preclusion under the CSRA as well as the meaning of 5 U.S.C. § 7121(a)(1), as amended (the issue on which the case was ultimately decided).

In light of its long history litigating federal employee claims and, in particular, the appropriate application of the principles of CSRA preclusion, NTEU has a strong interest in ensuring that this Court address these issues only when and if a clearly presented conflict between the circuits arises.

2. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization representing approximately 600,000 employees of the federal government and the D.C. government. It represents the interests of those employees through legal representation, legislative advocacy, technical expertise, and informational services. In its litigation on behalf of federal employees in federal court, it has often addressed allegations that the claims of the employees are precluded by the CSRA. In light of its long-standing concern to protect the right of federal employees to seek judicial redress, it also filed an *amicus* brief in *Whitman*.

ARGUMENT

I. UNIQUE FEATURES OF THE FAA PERSONNEL SCHEME RENDER THIS CASE AN UNSUITABLE VEHICLE FOR CONSIDERING BROAD ISSUES OF CSRA PRECLUSION

A. Petitioners are air traffic controllers employed by the Federal Aviation Administration (FAA). The Department of Transportation and Related Agencies Appropriations Act for 1996, enacted Nov. 15, 1995 (DOT Act),[3] directed the FAA Administrator to develop and implement a new personnel management system through negotiations with the exclusive bargaining representative(s) of FAA employees. *See* 49 U.S.C. § 40122(a)(1). This system, designed to address the "unique demands" on the agency's workforce, was to provide "greater flexibility in the hiring, training, compensation, and location of personnel." *Id.* § 40122(g).

In developing this new system, the FAA was generally free to ignore the CSRA. Congress specified that only a few sections of Title 5 of the U.S. Code must apply to the FAA. The sections made applicable under the 2000 amendment include some provisions related to the Merit Systems Protection Board's jurisdiction and chapter 71, relating to labor-management relations. 49 U.S.C. § 40122(g)(2).

Pursuant to the DOT Act, the FAA and the National Air Traffic Controllers Association, AFL-CIO (NATCA), the exclusive representative of the air

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[3] Pub. L. No. 104-50, Sec. 347, 109 Stat. 436, 460 (1995). *See also* Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, Title II, § 253, 110 Stat. 3213, 3237 (1996), amended by Pub. L. No. 106-181, Title III, §§ 307(a), 308, 114 Stat. 61, 124, 126 (2000) (codified at 49 U.S.C. § 40122).

traffic controllers, entered into negotiations over a new compensation system that would be an integral element of the agency's personnel management system. In July 1998, the FAA and NATCA reached agreement on a Position Classification Standard (PCS) to be used in determining employee compensation. Pet. App. 28a.[4] This agreement was supplemented by subsequent Memoranda of Understanding negotiated by the FAA and NATCA. Pet. App. 29a; Amended Compl. ¶ 17.

Significantly, the PCS prescribes a special Appeal Process by which an employee or facility may challenge a classification decision. Pet. App. 30a. An individual employee may initiate an appeal, but only the Facility Manager and the NATCA Facility Representative may file the appeal. Upon receipt of the appeal, a Classification Appeal Review Committee (*i.e.*, a NATCA representative and an Air Traffic Management Representative) is established. That Committee is to issue a written decision within 60 days; the decision is "binding and final, and there is no further appeal." If, however, the Committee fails to reach a mutual decision, either the NATCA or the management representative may request that the case be heard by a Classification Appeals Board. *Id.* at 30a-31a.

The FAA announced on October 1, 1998, that the negotiated pay agreement would be extended to supervisors and managers who work at FAA facilities. Pet. App. 17a n.1; 28a n.5. Thus, the appeals processes set out in the PCS are applicable to both nonbargaining unit and bargaining unit employees.

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[4] Pet. App. references are to the decisions appended to the Petitioners' Petition for a Writ of Certiorari.

B. The personnel system outlined above, with its facility classification system, is unique to the FAA. As the district court carefully explained (Pet. App. 41a), "[t]he DOT Act was intended to supplant the CSRA and permit the creation of a personnel system specifically designed for and by the FAA." Respondents gloss over the uniqueness of the FAA system and stress what they see as similarities with the CSRA system. *See, e.g.*, Resp. Br. 17. In fact, as described by the district court, the FAA system is a complete and largely self-contained scheme with only slight overlap with the CSRA. For example, the CSRA contains no counterpart affirmatively directing negotiation over pay and providing for resolution of disputes over facility classifications that form part of the pay compensation formula.[5]

The district court further elaborated on Congress' intent in providing the FAA with the discretion and flexibility to create its own personnel management system. The court found it clear that "Congress intended that resulting system to constitute the entire personnel system." *Id.* The court cited the provisions for review specified in the DOT Act with respect to certain personnel actions, as well as the significant absence of any provision in either the DOT Act or the FAA system for judicial review of "classification decisions." *Id.* at 41a-42a. Instead, it found, Congress left to the FAA's discretion how to review erroneous classification decisions—and that discretion was exercised through the negotiation of

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[5] Negotiations over pay are permitted in relatively rare circumstances under the CSRA. Only if the agency has been granted discretion to set pay, through a separate statutory provision, is the union entitled to negotiate over pay. *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 643-45 (1990).

the administrative appeals process outlined above. *Id.* "Where Congress wanted to guarantee certain remedies, it explicitly did so." *Id.* at 41a. Where it was silent, the court reasoned that Congress intended to preclude judicial review. *Id.* "In light of Congress' clear intent, the purpose and structure of the DOT Act limits judicial review for FAA employees to those [avenues] explicitly provided in the statute and accompanying procedures." *Id.* at 43a.

As this analysis makes clear, the relevant and governing question presented by this case is whether petitioners' claims are precluded by the *DOT Act*, given the special characteristics of the FAA personnel system.[6] Indeed, the government grounded its preclusion argument below on the DOT Act, referring to the CSRA by analogy only. There is thus no need for this Court to address the question of whether the *CSRA* precludes petitioners' claims. In any event, the special features of the FAA scheme make this case *sui generis* and an inappropriate vehicle for addressing the fundamental questions raised in the petition about the scope of CSRA preclusion.

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[6] We should point out the ambiguities in the record concerning the nature of this statutory scheme that further highlight its unsuitability as a vehicle for this Court's review. There appear to be *three* dispute resolution processes that may be relevant: the special appeals process outlined in the PCS and discussed above; the grievance process set forth in the collective bargaining agreement (CBA); and a third internal agency grievance resolution procedure set forth in the FAA Personnel Management System (PMS), as described by respondents (Resp. Br. 3-4, 7-8, 17-18). It is unclear whether complaints concerning the classification system may be grieved under the negotiated grievance procedure of the CBA or whether the PCS, or even the PMS, is the *exclusive* avenue for complaints of this nature by bargaining unit and nonbargaining unit employees.

Amici are aware that this Court granted certiorari to review issues of preclusion in another case involving an FAA employee, *Whitman v. Department of Transportation*, 547 U.S. 512 (2006). There are, however, significant differences between the two cases that explain why this case does not warrant review. In *Whitman*, the petitioner alleged that the FAA had subjected him to drug-testing in a nonrandom manner, in violation of his constitutional rights; he also brought an ancillary and derivative APA claim based on an FAA statute requiring it to ensure employees are selected for testing by nondiscriminatory methods. Thus, the legal principles at issue in *Whitman* were not dependent upon the unique FAA personnel system. This case, by contrast, implicates the singular FAA personnel management system and agreements negotiated pursuant to that system.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON CSRA-PRECLUSION PRINCIPLES WARRANTING INTERVENTION BY THIS COURT

A. D.C. Circuit Precedent Does Not Broadly Preclude Review of All Federal Employee Claims

The parties premise their claim of a circuit conflict on the assertion that the D.C. Circuit broadly precludes judicial review under statutes other than the CSRA of "federal employee claims" generally. *See, e.g.*, Pet. Br. i; Resp. Br. 13-14 & n.5. This incorrect assertion ignores, among other things, that the court below explicitly recognized in its decision that federal employees could pursue claims in court that are grounded on a "source of law" that is "independent" of the CSRA. Pet. App. 7a. Thus, and in general, the parties misapprehend the D.C. Circuit's jurispru-

dence. That court precludes review only of claims grounded on the APA where the CSRA prescribes an administrative review process, as well as claims where, as dictated by *United States v. Fausto*, 484 U.S. 439, 452 (1988), Congress' intent to proscribe review is "fairly discernable" in the CSRA's scheme.

1. The enactment of the CSRA in 1978 brought to an end the courts' willingness to exercise jurisdiction under the APA over a variety of administrative actions, such as denials of promotion or leave requests, that were alleged to have been arbitrary, capricious, or an abuse of agency discretion. The D.C. Circuit explained this reversal in *Carducci v. Regan*, 714 F.2d 171, 174 n.1 (D.C. Cir. 1983). In contrast to the pre-CSRA era, the court held that it had no jurisdiction over an employee's complaint about his allegedly arbitrary reassignment, even if it was a "nonmajor personnel action" for which no relief was available under the CSRA. 714 F.2d at 174-75.

The D.C. Circuit's decision in *Carducci* foreshadowed the 1988 holding in *Fausto*, where this Court held that the language and structure of the CSRA evinced a "deliberate" decision by Congress to preclude a particular category of employees (nonveteran members of the federal excepted service) from securing direct judicial review in a particular category of cases (adverse personnel actions). 484 U.S. at 455; *see also id.* at 443-44. The Court concluded that a congressional intent to affirmatively and deliberately preclude review of the asserted claims was "fairly discernable" in the comprehensive nature of the statutory scheme. 484 U.S. at 443, 448-49, 452.

Following that reasoning, the D.C. Circuit has refused to permit judicial review, under the APA, of

certain types of employee claims. These include cases where the CSRA prescribes a route for resolution of the claim.[7] They also include various types of personnel actions covered by the CSRA that are taken against categories of employees granted limited or no rights under the CSRA, and various categories of actions (even if taken against employees covered by the CSRA) for which the court can reasonably infer that Congress intended that no judicial relief be available.[8]

2. At the same time, the D.C. Circuit recognizes the right of federal employees to file suit regarding other matters affecting their employment. For example, the D.C. Circuit has consistently sanctioned APA pre-enforcement challenges to the validity of regulations or agency policies.[9] Such challenges have withstood arguments that the claims were precluded by the CSRA. As the court explained, review of "defined employment rights" is "quite different" from "pre-enforcement judicial review of rules." *NTEU v. Devine*, 733 F.2d at 117 n.8.

Further, the D.C. Circuit has consistently acknowledged federal employees' right to bring actions under such statutes as the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Privacy Act, 5 U.S.C.

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[7] *See, e.g., Fornaro v. James*, 416 F.3d 63 (D.C. Cir. 2005) (employees seeking higher disability benefits are required to follow route specified in CSRA for benefit determinations).

[8] *See, e.g., Graham v. Ashcroft*, 358 F.3d 931 (D.C. Cir. 2004) (holding that FBI employee may not obtain judicial review of a letter of censure where that personnel action is not covered by CSRA, even though employee is granted certain judicial rights under CSRA).

[9] *See, e.g., NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006); *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984).

§ 552a. The court has never declined jurisdiction merely because the employee is seeking material that will aid him or her in pursuing an employment-related action of some sort.[10] In cases arising under the Privacy Act, for example, the court will entertain claims for damages resulting from a disclosure or destruction of information contrary to that Act.[11] It does, however, scrutinize an employee's employment-related claim to guard against artfully pled complaints that attempt to circumvent the CSRA. Thus, the court has declined jurisdiction where the litigant is seeking to obtain review of a personnel action in the guise of a Privacy Act complaint.[12]

In sum, it is a gross overstatement to claim that the D.C. Circuit holds that the CSRA precludes "all disputes related to federal employment" under statutes other than the CSRA (Pet. Br. 12) or "all employment-related claims" except for those specific instances where the CSRA itself permits judicial review (Resp. Br. 13 n.5). While the court may have occasionally used such undefined phrases as "federal employee claims," it has given no indication of any intent to sweep *all* employee claims within that

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[10] *See, e.g., Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) (former Peace Corps employee sought information under FOIA that would allegedly aid him in establishing his claim of mistreatment by the Corps).

[11] *See Chambers v. Dep't of Interior*, 568 F.3d 998 (D.C. Cir. 2009) (former federal employee seeking damages for failure to timely provide performance appraisal and for failure to safeguard document from destruction).

[12] *See, e.g., Kleiman v. Dep't of Energy*, 956 F.2d 335 (D.C. Cir. 1992) (employee claiming that personnel file inaccurately reflected his job title precluded where employee was actually attacking his position classification, for which CSRA provides exclusive remedies).

rubric, regardless of the statutory basis for jurisdiction.

B. There Is No Conflict Among the Circuits Regarding CSRA Preclusion

Petitioners allege that the decision below confirms a "well-established inter-circuit conflict." Pet. Br. 10. Thus, the petitioners claim that the Sixth and Eleventh Circuits have given the CSRA "a similarly broad preclusive effect" as the D.C. Circuit (Pet. Br. 16-17), while the Federal, Tenth, Second, and Ninth Circuits have allegedly adopted a narrower ruling (*id.* at 17-26). Respondents also purport to identify a "direct conflict" among the circuits, although they assert that the D.C. Circuit is aligned with the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, while only the Federal and First Circuits apply what they term a "narrower" preclusion rule. Resp. Br. 13 n.5. But, as shown, the decision of the court below breaks no new ground and does not create a conflict.

1. The greatest tension is alleged to be between the D.C. Circuit and the Federal Circuit, evidently because of the large number of cases arising within the Federal Circuit under the Tucker Act, 28 U.S.C. § 1491, seeking money damages pursuant to various money-mandating statutes.

The Federal Circuit properly recognizes Tucker Act jurisdiction where a statute, regulation, or constitutional provision mandates compensation by the Federal government for damages sustained, thereby providing a substantive right to recover money damages. *See United States v. Testan*, 424 U.S. 392, 400 (1976). Various money-mandating statutes, such as the Fair Labor Standards Act, were invoked in the

cases cited by petitioners (Pet. Br. 22-23; 29-30). In each of these cases, the Court of Federal Claims (or the various district courts with jurisdiction under 28 U.S.C. § 1346(a)(2)) retains jurisdiction under the Tucker Act, notwithstanding the CSRA. As the Federal Circuit has correctly observed, a holding that the CSRA provides the exclusive avenue for relief for such claims would render these money-mandating statutes "largely, if not totally, superfluous as unenforceable." *Bosco v. United States*, 976 F.2d 710, 714 (Fed. Cir. 1992). There is no indication in the CSRA that Congress ever contemplated such as result.

The D.C. Circuit has never taken issue with the Federal Circuit's jurisdiction grounded on the Tucker Act. Indeed, as noted, the court below acknowledged the appropriateness of a Tucker Act claim in the Court of Federal Claims where there was "an independent source of law" to support the action. *See* Pet. App. 7a, citing *Mudge v. United States*, 50 Fed. Cl. 500, 502 (Fed. Cl. 2001). Hence, the court of appeals expressly declined to find fault with the Federal Circuit precedent permitting federal employee litigation of money claims asserted under such statutes as the Tucker Act or the Fair Labor Standards Act, notwithstanding the CSRA.[13]

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[13] Both petitioners and respondents cite *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999), and *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994), as evidencing a conflict with the D.C. Circuit. Pet. Br. 19-21; Resp. Br. 13 n.5. *Romero* involved refund claims by federal employees asserting that income taxes had improperly been withheld from their pay pursuant to a withholding agreement between Puerto Rico and the Treasury Department. Consistent with the D.C. Circuit's decision below, the employees relied, not on the APA as petitioners do in this case, but on an "independent source of law," namely, the Tucker Act in combination with the Back Pay

Nor have the other cited circuits put themselves in conflict with the D.C. Circuit. Respondents concede that the precedent in the Second, Ninth and Tenth Circuits is consistent with that of the D.C. Circuit, contrary to the contentions of the petitioners. *Compare* Resp. Br. 13 n.5 *with* Pet. Br. 24-26. The only case that, in respondents' view, conflicts with D.C. Circuit precedent is *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984). In that case, an applicant for an administrative law judge position had brought an APA claim against the Office of Personnel Management for arbitrarily denying his application. The First Circuit declined to find his claim precluded by the CSRA, citing a reluctance to imply preclusion from congressional silence. 727 F.2d at 194-95. Because the First Circuit itself has signaled that its pre-*Fausto* decision in *Dugan* is no longer good law (*Irizarry v. United States*, 427 F.3d 76, 78 n.2 (1st Cir. 2005)), it should not form the predicate for review by this Court.

2. On the other side of the alleged split in the circuits, neither petitioners nor respondents have identified any circuit that has adopted the excessively broad preclusion rule erroneously attributed to the D.C. Circuit. Many of the cited cases merely hold

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Act. The government nonetheless argued that the employees' cause of action was precluded by the CSRA. The Federal Circuit correctly rejected the government's CSRA preclusion claims, recognizing that there was no indication that a tax refund claim fell within the contemplation of the CSRA. 38 F.3d at 1211.

Petitioners maintain that *Worthington* is "entirely inconsistent" (Pet. Br. 27) with the D.C. Circuit's preclusion analysis. But the D.C. Circuit, while noting in *dicta* doubts about the correctness of the decision, ultimately found it inapposite. *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009), pet. for cert. pending, No. 08-1418.

that challenges to a reassignment, a minor personnel action encompassed within the CSRA scheme, are precluded by the CSRA. *See, e.g.*, *Tiltti v. Weise*, 155 F.3d 596 (2d Cir. 1998); *Ryon v. O'Neill*, 894 F.2d 199 (6th Cir. 1990); *Weatherford v. Dole*, 763 F.2d 392 (10th Cir. 1985); *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982). The other cases cited by respondents involve challenges to similar minor personnel actions. *See Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (letter of reprimand, 2-day suspension, termination of a temporary promotion); *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984) (performance rating). Petitioners' remaining cases from the Eleventh Circuit involve the refusal to entertain state tort claims closely related to the employee's federal employment. *Broughton v. Courtney*, 861 F.2d 639 (11th Cir. 1988) (malicious interference with employment and conspiracy to interfere with employment); *Hendrix v. Snow*, 170 Fed. Appx. 68 (11th Cir. 2006) (state tort claims of conspiracy involving acts within supervisor's scope of employment).[14]

None of these cases stands for the proposition that the CSRA precludes review of "all employment-related claims" or otherwise suggests an intent to deny jurisdiction where there is a separate, substantive cause of action apart from the APA. Instead,

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[14] Other circuits—including the Ninth and Tenth, circuits petitioners claim are at odds with the Eleventh—have similarly held that the CSRA preempts state tort claims related to employment. *See Roth v. United States*, 952 F.2d 611, 614-16 (1st Cir. 1991); *Rollins v. Marsh*, 937 F.2d 134, 139-40 (5th Cir. 1991); *Saul v. United States*, 928 F.2d 829, 840-43 & n.23 (9th Cir. 1991); *Petrini v. Howard*, 918 F.2d 1482, 1484-85 (10th Cir. 1990).

each stands for the unremarkable proposition that the CSRA precludes review of claims that fall within its scope.

III. There Is No Disagreement Among the Circuits Regarding the Import of 5 U.S.C. § 7121(a)(1), and That Issue Is Not Properly Before This Court

A. Section 7121(a)(1) Does Not Itself Authorize Judicial Review; Rather, as Amended, It Does Not Preclude Employee Access to Courts for Judicial Redress of Statutory Rights

Respondents devote a significant percentage of their brief (Resp. Br. 6-7, 10, 18-25) to an issue that was not raised to this Court by petitioners: whether 5 U.S.C. § 7121(a)(1) specifically authorizes judicial review.[15] That issue is a total red herring, for no court has so held. Indeed, this Court in *Whitman* spelled out that section 7121(a)(1) does not confer jurisdiction (547 U.S. at 513-14), and there is no reason for that question to be revisited.

Some background regarding the evolution of section 7121(a)(1) shows the absence of merit in the government's argument about the meaning of that provision. That section requires collective bargaining agreements to provide procedures for the settlement of grievances. "Grievances," under 5 U.S.C.

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[15] Petitioners' complaint stated that this section "establishes" a federal employee's right to seek a judicial remedy for a grievance subject to negotiated procedures in a CBA. Amended Compl. ¶ 37. Nevertheless, the D.C. Circuit squarely (and correctly) rejected that contention (Pet. App. 7a), and petitioners do not reiterate it to this Court as a basis for jurisdiction.

§ 7103(a)(9), include "any matter relating to the employment of the employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation, affecting conditions of employment." Prior to its amendment in 1994, section 7121(a)(1) provided that the negotiated procedures "shall be the exclusive procedures for resolving grievances which fall within its coverage," with certain exceptions.

In *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), the Federal Circuit, sitting en banc, held that section 7121(a)(1) unambiguously made the grievance procedure exclusive as to all other procedures, whether administrative or judicial. In so concluding, the court relied on the absence of any qualifying language confining its reach to "administrative" procedures. Based on this interpretation of section 7121(a)(1), the court dismissed for lack of jurisdiction an action brought under the Fair Labor Standards Act.

In 1994, Congress corrected the Federal Circuit's interpretation of section 7121(a)(1) by adding to it the very term whose absence dictated the result in *Carter*: the word "administrative." Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4361, 4365-66 (1994). Post-amendment, section 7121(a)(1) provides that the procedures provided in a collective bargaining agreement for the settlement of grievances "shall be the exclusive *administrative* procedures for resolving grievances which fall within its scope." (Emphasis added.)

Reviewing this statutory language, the Federal Circuit in *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002), found the plain language to be clear: "while § 7121(a)(1) [as amended] limits the administrative resolution of a federal employee's grievances

to the negotiated procedures set forth in his or her [collective bargaining agreement], the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances." *Id.* at 1228. The Eleventh Circuit agreed. *ASEDAC v. Panama Canal Comm'n*, 329 F.3d 1235, 1238-41 (11th Cir. 2003).[16]

Contrary to respondents' assertions (Resp. Br. 14 n.6, 18-19), *Mudge* and *ASEDAC* do *not* hold that this section itself creates a cause of action, or a new right to judicial review. They simply hold that, as amended, it no longer precludes courts from exercising jurisdiction that exists under some other statute, merely because that claim could also have been pursued through the negotiated grievance procedure.

To be sure, *Mudge* did use some imprecise language, referring to the amended language as "establish[ing]" a right to seek a judicial remedy. *Mudge*, 308 F.3d at 1227, 1229.[17] At the same time, however, *Mudge* clearly and repeatedly stated that the critical feature of the amended language is that it no longer forecloses (or restricts or limits) judicial review. 308 F.3d at 1226, 1228, 1230, 1232. *Accord ASEDAC*, 329 F.3d at 1239 ("text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances" (quotations omitted)).

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[16] The Eleventh Circuit reaffirmed its holding in subsequent proceedings on remand. *ASEDAC v. Panama Canal Comm'n*, 453 F.3d 1309, 1312 n.3 (11th Cir. 2006).

[17] The Ninth Circuit in *Whitman v. Dep't of Transportation*, 382 F.3d 938, 942 (9th Cir. 2004), focused on the imprecise language in *Mudge* regarding the "establish[ment]" of a right to judicial review. It is based on that misreading that the Ninth Circuit disagreed with the Federal and Eleventh Circuits. As noted, the Court clarified the matter in its *Whitman* decision.

That the Federal Circuit never contemplated that section 7121(a)(1) created jurisdiction for employees to sue in federal court in the first instance, as respondents assert (*e.g.*, Resp. Br. 24-25), is clearly confirmed by *Doe v. United States*, 513 F.3d 1348 (Fed. Cir. 2008). After comprehensively reviewing *Carter*, the 1994 legislative change, and *Mudge*, the Federal Circuit squarely rejected the employees' contention that section 7121(a)(1) created a basis for jurisdiction over their claims that an agency practice violated their collective bargaining agreement. The court explained that the amended section merely removed a previous barrier to assertion of jurisdiction under another statute. 513 F.3d at 1355-56.

The D.C. Circuit also understood *Mudge*'s import. The court below correctly characterized *Mudge* as "holding that the 1994 amendment signaled Congress's intent no longer to preclude all review of covered grievances." Pet. App. 5a-6a. It had no difficulty in rejecting petitioners' contention that section 7121(a)(1) *establishes* the right to judicial review. *Id.* at 6a-7a.

There is thus no split in the circuits regarding the proper interpretation of section 7121(a)(1).

B. Contrary to Respondents' Contention, the Amended Section 7121(a)(1) No Longer Precludes Judicial Review of Claims that May Be Pursued Under a Negotiated Grievance Process

Although they did not press the argument below, respondents now appear to be taking the position that the amended section 7121(a)(1) completely precludes employees subject to a negotiated grievance process from bypassing those procedures and seeking

judicial review of any sort of employment-related claim. *See, e.g.*, Resp. Br. at 22. This is the necessary import of respondents' argument (at 20-24) that the 1994 amendment of section 7121(a)(1) did not make any substantive change in the law. To respondents, the grievance process is employees' exclusive remedy, *regardless of the existence of any other cause of action*.

Respondents did not make this argument in the court of appeals. Instead, they are resurrecting arguments made to this Court in *Whitman* and answered in detail in briefs filed in that case.[18] To a large extent respondents' argument rests on a straw-man: their erroneous interpretation of the holding in *Mudge*. But, in addition, respondents would have this Court believe that Congress amended a statute for no substantive purpose other than to "clarify" existing law regarding the choice of administrative remedies available. The *Mudge* court rejected this argument with the sound observation that "there was no need for Congress to clarify § 7121(a)(1) in this fashion" because the pre-1994 statute had unambiguously made the negotiated procedure exclusive as to other administrative remedies. 308 F.3d at 1228.

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[18] *See, e.g.*, Brief for the Respondents on Writ of Certiorari at 36-44, *Whitman v. Dep't of Transportation*, 547 U.S. 512 (2006) (No. 04-1131); Reply Brief for the Petitioner at 18-20, *Whitman* (describing legislative history of amendment to section 7121(a)(1)); Brief for the National Treasury Employees Union as *Amicus Curiae* Supporting Petitioner at 11-23, *Whitman* (same; also discussing the government's policy arguments supporting its reading of that section). *See also* Barbara A. Atkin, Elaine Kaplan & Gregory O'Duden, *Wedging Open the Courthouse Doors: Federal Employee Access to Judicial Review of Constitutional and Statutory Claims*, 12 Emp. Rts. & Emp. Pol'y J. 233, 259-71 (2008).

Finally, respondents reiterate that there would be a wave of litigation if section 7121(a)(1) is interpreted as not barring litigation of "employee grievances." Resp. Br. 25. This contention is wholly without foundation. Although the section has existed in its current form for 15 years, respondents are able to point to no resulting burden.

CONCLUSION

The D.C. Circuit has not "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," as specified by Rule 10 of the rules of this Court. For that reason, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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